Indiana Journal of Law and Social Equality

Volume 9 | Issue 2 Article 4

2021

When Rational Basis Review is Irrational: An Argument for Applying Heightened Scrutiny to Statutes Criminalizing Homelessness

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Publication Citation

Talia Lewis, When Rational Basis Review is Irrational: An Argument for Applying Heightened Scrutiny to Statutes Criminalizing Homelessness, 9 Ind. J.L. & Soc. Equality 239 (2021).

When Rational Basis Review is Irrational: An Argument for Applying Heightened Scrutiny to Statutes Criminalizing Homelessness

Talia Lewis

Rational basis review under Constitutional equal protection jurisprudence affords the classes it protects the lowest standard of review—one that is very deferential to the dictates of the legislature. The Supreme Court has determined that individuals facing statutory discrimination solely due to economic status or wealth are accorded this "rational basis" standard of review. Homeless people in the United States have historically faced regulations and statutes that effectively criminalize them. Although these statutes necessarily target the homeless due to economic status, no court has yet determined if the homeless face statutory discrimination solely based on their economic status. If the homeless face statutory discrimination for any reasons in addition to economic status, these criminalizing statutes should be reviewed under a higher standard. There are three levels of heightened scrutiny: strict scrutiny, intermediate scrutiny, and rational basis "with a bite." This Article argues that the homeless—individuals, or as a class—should be accorded a heightened standard of review by courts reviewing the statutes that target them. It begins with a review of equal protection and due process precedents and a discussion about the homeless population in America. It continues by analyzing how a lawyer could best argue for applying each level of heightened scrutiny to statutes targeting the homeless. Unquestionably, the homeless are set further back when governing bodies legislate to criminalize their involuntary conduct. The judiciary should extend protections to this vulnerable group by reviewing the statutes criminalizing homelessness with a higher level of scrutiny.

INTRODUCTION

The mythic homeless person—the man living alone, dirty, underneath a bridge, suffering with drug addiction and mental infirmity—has done a severe disservice to the public's perception of the homeless population. A large portion of the American populace believe that homelessness is a direct result of the sufferer's poor choices.[1] Thus, the homeless are seen as an unsympathetic group. This myth is just that: an untruth. In fact, homeless people come in all shapes and sizes. Many families, for example, suffer from homelessness as a result of eviction and lack of

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[1] *See* Kyra Gurney, *Miami Beach Law Limits Panhandling. Civil Rights Groups Say that Violates Free Speech.*, MIAMI HERALD (Sept. 5, 2018, 3:18 PM), https://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article217672810.html (quoting local mayor saying the "homeless include people who are mentally ill and who are dangerous to both residents and visitors and that can't be ignored.").

affordable housing.[2] Although many of the homeless population do suffer with mental illness and substance abuse, "many more homeless [people] do not."[3]

The poor public perception of the homeless population has resulted, at least tangentially, in statutes that target this group for engaging in life-sustaining activities.[4] Even when not explicitly targeted toward the population, homeless people are the *de facto* victims of this type of legislation.[5] Anti-camping statutes, for example, may seem like a good enforcement tool to regulate use of public parks.[6] In practice, however, these ordinances permit police departments to evict and arrest homeless people after they've set up "camp."[7] These statutes are termed "criminalization" statutes because they effectively criminalize acts that otherwise are considered innocent.

Lawsuits have been filed and litigated that challenge the constitutionality of these criminalization statutes.[8] Some of the more successful lawsuits have challenged statutes based on the Eighth Amendment prohibition on cruel and unusual punishment.[9] This Amendment prohibits punishing someone for any involuntary status because it is cruel and unusual to do so.[10] The homeless plaintiffs in *Pottinger* argued that they were being unconstitutionally targeted by the City of Miami for their homeless status in contravention with the Eighth Amendment.[11] The court agreed and held that the City's enforcement tactics against the homeless, which criminalized innocent conduct like sleeping, eating, sitting, and more, "effectively punish[ed] them for something for which they may not be convicted": acts inherent in their homeless status.[12] Some would argue that there are already sufficient routes for lawyers to challenge statutes for their

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2 *See generally* Cynthia Griffith, *Lack of Affordable Housing Remains the Leading Cause of Homelessness,* INVISIBLE PEOPLE (Mar. 22, 2019), https://invisiblepeople.tv/lack-of-affordable-housing-remains-the-leading-cause-of-homelessness/ (explaining how people in America cannot afford to pay rent and often become homeless as a consequence).

3 ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 50 (3d ed. 2014).

4 U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF HOMELESSNESS 7 (2012).

5 *See* Justin Jouvenal, *Homeless Say Booming Cities Have Outlawed Their Right to Sleep, Beg, and Even Sit*, WASH. POST (June 2, 2016), https://www.washingtonpost.com/local/public-safety/homeless-say-booming-cities-have-outlawed-their-right-to-sleep-beg-and-even-sit/2016/06/02/7dde62ea-21e3-11e6-aa84-42391ba52c91_story.html.

6 Anti-camping statutes are understood to be laws that criminalize the act of sleeping or erecting tents on specific property. *See, e.g.*, *Nicholas May, Fourth Amendment Challenges to "Camping Ordinances": A Legal Strategy to Force Legislative Solutions to Homelessness*, 11 RICH. J.L. & PUB. INT. 1, 1 (2008).

7 *See, e.g.*, SACRAMENTO, CAL., CITY CODE § 12.52.030 (prohibiting camping or using "camp paraphernalia" on any public or private property).

8 *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992) (granting relief to class of homeless plaintiffs that prohibited officials from arresting homeless individuals for engaging in harmless, life-sustaining activity); Tobe v. City of Santa Ana, 892 P.2d 1145 (Cal. 1995) (finding ordinance challenged did not unconstitutionally restrict homeless individual's right to travel and did not violate the state or federal constitutions by allowing punishment based on status).

9 *See Pottinger*, 810 F. Supp. at 1564–65.

10 *See* Robinson v. California, 370 U.S. 660, 666 (1962).

11 *Pottinger*, 810 F. Supp. at 1564–65.

12 *Id.*

homeless clients, like those conferring Eighth Amendment protections.[13] Unfortunately, some of these protections have proven tenuous.[14]

The judiciary should review statutes involving homeless people higher scrutiny under the Due Process and Equal Protection Clauses of the Fourteenth and Fifth Amendments to remedy the unhoused population's heightened vulnerability. The judiciary applies levels of scrutiny to statutes that affect certain classes of people to ensure they pass constitutional muster.[15] These classes are groups that require further protection from officials.[16] It has been decades since the first lawsuit advocated for homeless rights in court by challenging discriminatory statutes and enforcement methods.[17] Still, an inordinate number of statutes target and criminalize the homeless.[18]

For homeless individuals to be reestablished back into society, they need time and space; they need society to recognize their humanity.[19] This requires harsher oversight by the judiciary over the legislation that regulates their conduct. By applying a higher level of scrutiny to the laws targeting the homeless population, governments will have less leeway to pass these criminalizing statutes or ordinances. Rather, the laws that are passed will be more purposeful and less frivolous, allowing homeless individuals the ability to rebuild their lives without constant fear of arrest for trespass or violation of any number of these ordinances.

This Article argues that courts should accord homeless people higher scrutiny under the Equal Protection and Due Process Clauses to the federal Constitution. Lawyers could persuade the courts to apply higher scrutiny to statutes criminalizing the homeless in a number of ways. Section I.A of this paper will discuss who the homeless population is. Section I.B will examine the constitutional background to the arguments I make in Part II. Section I.C will review the types of criminalization statutes on the books and why legislatures pass them. Part II will

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13 For more information about Eighth Amendment Challenges and how they work in the context of challenging statutes criminalizing homelessness, see Edward J. Walters, *No Way Out: Eighth Amendment Protection for Do-Or-Die Acts of the Homeless,* 62 U. CHI. L. REV. 1619 (1995).

14 *See* Jerry Ianelli, *Judge Invalidates Miami's Landmark Homeless-Protection Order from 1998*, MIAMI NEW TIMES (Feb. 15, 2019, 3:16 PM), https://www.miaminewtimes.com/news/miami-judge-throws-out-pottinger-homeless-protection-law-11087371 (discussing Miami federal judge's decision to invalidate the *Pottinger* agreement made pursuant to findings that the homeless in the city needed further protection from city enforcement measures unconstitutionally criminalizing the homeless for innocent conduct).

15 *See* Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 742 (2014) ("The Court has, in fact, devised mechanisms that are supposed to be particularly adept at rooting out unfair prejudices: suspect classification analysis and the associated tiers-of-scrutiny framework.").

16 *Id.*

17 *See Pottinger*, 810 F. Supp. at 1565.

18 *See generally* U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 4 (discussing how criminalizing homelessness negatively impacts communities and individuals nationwide and how some communities have contributed to or remedied the problem).

19 *See generally* Stephen J. Schnably*, Rights of Access and the Right to Exclude: The Case of Homelessness*, *in* PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY 553 (G.E. van Maanen & A.J. van der Walt eds., 1996) (explaining that the more that homeless people resist being pathologized and the more their relatable problems are recognized as such, the more potential there is to implement solutions to address homelessness).

review and discuss the better arguments for according the homeless heightened scrutiny. Section II.A focuses on strict scrutiny, Section II.B focuses on intermediate scrutiny, and Section II.C focuses on rational basis "with a bite" scrutiny.

I. BACKGROUND

A. Who are the Homeless?

The homeless population is innately hard to define. The McKinney-Vento Act (originally the Stewart B. McKinney Homeless Assistance Act), signed into law by President Clinton in 1987, was the first federal legislation to furnish a definition for the group.[20] In short, the Act states a "homeless" person "lacks a fixed, regular, and adequate nighttime residence," has a primary residence "not designed for or ordinarily used as a regular sleeping accommodation for human beings," or "an individual or family who will imminently lose their housing."[21]

This legislation provided a foundation for defining who is "homeless," but it falls short of including many others in its definition that might otherwise be considered homeless. For example, the Act omits people who may be staying with friends or family, employing short-term living arrangements like motels, and those in prisons or other institutions.[22] The McKenny-Vento definition is still a point of contention for legislators, service practitioners, and scholars today because homeless individuals who fall outside its parameters are not eligible for support from the federal government.[23] As a result, logging statistics about the homeless population is challenging. Some research groups follow the definition from the McKinney-Vento Act, and others make their definitions broader to include the groups of homeless left outside the scope of the Act's definition.[24]

To answer the question asking *who* composes the homeless population, it is important to discuss the problems with "counting" and gathering data on this transient, and ever-changing group. There are a number of methods that have been employed by the United States over time, but two methods are most commonly used: (1) the "point in time count"; and (2) estimating the number of people who have been homeless over a specific period of time.[25] Both methods are imperfect.

The "point-in-time count" is self-explanatory. Data is gathered about how many people are homeless over a three-day period.[26] To gather this information, volunteers may be assigned to search a span of blocks or parks.[27] These volunteers

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[20] Jennifer Lee-Anderson, *Homelessness Count Methodologies Literature Review*, HOMELESSNESS RES. & ACTION COLLABORATIVE PUBLICATIONS & PRESENTATIONS 7 (2019).

[21] 42 U.S.C. § 11302 (2012).

[22] Lee-Anderson, *supra* note 20.

[23] *See id.*

[24] *See id.*

[25] SCHWARTZ, *supra* note 3, at 51.

[26] *How We Count People Experiencing Homelessness*, U.S. CENSUS 2020, https://2020census.gov/en/what-is-2020-census/focus/people-experiencing-homelessness.html (last visited Feb. 4, 2021).

[27] *Id.*; SCHWARTZ, *supra* note 3, at 51.

then relay information on the people they encountered to localities or organizations.[28] These agencies utilize that information, in conjunction with information from city homeless shelters, to generate point-in-time estimates.[29] Unfortunately, this method has severe limitations. It "will indicate that the extent of homelessness is much smaller than the size suggested by studies that look at the number of people who have experienced homelessness within a specified period of time."[30] Furthermore, the study will mischaracterize the population of individuals who suffer homelessness because it's more likely to cover individuals who are chronically homeless, rather than temporarily homeless.[31] Therefore, the point-in-time count is less accurate for gathering data on the whole homeless population and more accurate for gathering data on the chronically homeless population.

On the other hand, estimating the number of people who have been homeless over a period of time is more likely to produce information characterizing the entire homeless population. These data are collected by employing numerous methods, including surveys via telephone and in-person interviews.[32] However, this method faces its own hurdles because these types of studies require the surveyors to furnish definitions of "homeless people," and create plans for how to reach this population—which can be challenging, to say the least.[33] One salient example reveals how these studies furnish more, sometimes stark, data about the homeless population. The 2012 Annual Homeless Assessment Report to Congress shows that in 2011, "more than twice as many people, 1.5 million, were in a homeless shelter or transitional housing facility for one or more nights during the year than were homeless on a single night in January."[34] These "period of time" studies have provided some of the best data about the homeless population in the United States.

Despite the flaws with data collection on the homeless population, there is a good pool of information gathered over the last twenty years that can be used to make conclusions about who composes the homeless population. One undisputed, empirical conclusion is "that homelessness is associated with extreme poverty."[35] Commencing in the Great Depression, and continuing through today, there has been a growing chasm separating the rich from the poor in the United States.[36] This income inequality has manifested in different proportions of America's population suffering worse life, health, and economic outcomes than others. These outcomes are clearly represented in the composition of America's homeless.

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28 SCHWARTZ, *supra* note 3, at 51.

29 *Id.* at 50–51.

30 *Id.* at 51.

31 *Id.*

32 *Id.* at 52; Lee-Anderson, *supra* note 20.

33 *See* Lee-Anderson, *supra* note 20.

34 SCHWARTZ, *supra* note 3, at 52.

35 *Id.* at 54.

36 DEBORAH K. PADGETT, BENJAMIN F. HENWOOD & SAM J. TSEMBERIS, HOUSING FIRST: ENDING HOMELESSNESS, TRANSFORMING SYSTEMS, AND CHANGING LIVES 16 (2015).

Social factors, combined with economic and historic events, collectively created a huge disparity of African Americans, as compared to whites, in the homeless population. Segregation, the high demand for single-family homes following World War II, "white flight" to the suburbs, red-lining tactics, and draconian drug policies all contributed to the multiplicity of hurdles faced by African Americans to buy homes or enhance their economic statuses.[37] The result is bleak:

> Members of racial and ethnic minorities constitute about one third of the U.S. population, one half of the poor, and almost two thirds of the homeless**.** *African Americans constitute 12% of the U.S. population, about one half of the homeless, and up to 85% of the long-term or chronically homeless* (U.S. Department of Housing and Urban Development, 2010).[38]

In short, the total United States population of specific minority groups, including and especially African Americans, is dramatically overrepresented in the homeless.

Apart from racial disparities, there are other disparately represented groups in the homeless population. This population, in general, is composed of far more men than women: "[a]mongst individuals . . . 70 percent are men."[39] Moreover, many more individuals than families experience homelessness: seventy percent are individuals, and thirty percent of the population are "people in families with children."[40] Another salient subpopulation is unaccompanied youth, which includes those under the age of twenty-five.[41] These youth compose about six percent of the total homeless population.[42] Veterans, too, compose seven percent of the total homeless populace.[43]

Beyond those who are already struggling with homelessness, there remain households who face a constant risk of homelessness. This population includes many who live paycheck to paycheck and who struggle to afford basic necessities.[44] These impoverished individuals and families turn to government assistance for help fending off eviction and locating affordable housing—even temporarily.[45] In the 1960s, the U.S. government passed federal legislative intervention to aid low-income people with housing expenses.[46] Subsequently, Nixon's election and "the

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37 *Id.* at 17–18.

38 *Id.* at 17 (emphasis added).

39 *State of Homelessness: 2020 Edition*, NAT'L ALLIANCE TO END HOMELESSNESS, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-report/ (last visited Jan. 19, 2021).

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *See id.*

45 *Id.*

46 *See generally* Robert Haveman, Rebecca Blank, Robert Moffitt, Timothy Smeeding & Geoffrey Wallace, *The War on Poverty: Measurement, Trends, and Policy*, 34 J. POL'Y ANALYSIS & MGMT. 593 (2015).

economic recession of the 1970s put an effective halt to new public housing developments."[47] Then, in the 1980s, the government contributed to the growing problem by dramatically reducing federally subsidized housing.[48] Despite rising housing costs, the federal budget for housing assistance dropped almost in half from 1976 to 2002.[49] Now, 1.2 million households are on the verge of homelessness, relying on public housing despite the poor conditions, strict oversight, and long waiting lists.[50] In total, 42.6 million Americans survive hand-to-mouth—13.4% of the United States population.[51] Despite the enormous need, there remains a "7.2 million unit shortage of affordable rental units available to our nation's lowest income renters."[52] This shortage means many of our nation's poorest people will struggle to find a place to live:

> To put this into context, this means that for every 100 extremely poor households in the country, only 31 will find affordable and available rental units. Sixty-nine of the 100 will be forced to pay more than they can afford, leaving them unstably housed and vulnerable to homelessness.[53]

It is no secret why seeking and advocating for solutions to the threat of homelessness is an important policy pursuit. A substantial population of Americans constantly teeter on the verge of homelessness, and vulnerable populations—overrepresented in the total homeless population—are made more vulnerable by their homeless status.[54] In fact, homeless individuals have a harder time finding and keeping jobs, their children are deprived of the opportunity to continually attend school, and they are at much higher risk to suffer from "illness, mental health problems, substance abuse and crime."[55] State and local governments have employed a number of different programs to attempt to address the issue, but in 2017, America's homeless population rose for the first time in years.[56] This rise evidences the lack of progress made by many of these initiatives. Thus, lawyers should propose a solution to address the homeless population: to impose a higher

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47 PADGETT ET AL., *supra* note 36, at 19.

48 NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 18 (2018), https://nlchp.org/wp-content/uploads/2018/10/Housing-Not-Handcuffs.pdf.

49 PADGETT ET AL., *supra* note 36, at 19.

50 *See id.* at 19.

51 Emily Walkenhorst, *Census Figures Show Drop in State Poverty*, ARK. DEMOCRAT GAZETTE (Sept. 13, 2018) https://www.arkansasonline.com/news/2018/sep/13/census-figures-show-drop-state-poverty/.

52 NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 48, at 19.

53 *Id.*

54 *Homelessness and Racial Disparities*, NAT'L ALLIANCE TO END HOMELESSNESS, https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/inequality/ (last updated Oct. 2020).

55 SCHWARTZ, *supra* note 3.

56 Christopher Weber & Geoff Mulvihill, *America's Homeless Population Rises for the First Time in Years*, AP NEWS (Dec. 6, 2017), https://apnews.com/47662ad74baf4bb09f40619e4fd25a94/America%27s-homeless-population-rises-for-first-time-in-years.

level of scrutiny on the statutes that directly affect and oppress this group. This method would force state and local governments to employ alternatives aside from criminalizing homelessness. Without so many hurdles in the way of rebuilding their lives—like arrest for frivolous misdemeanors, and mounting court costs for trespassing tickets—homeless individuals will be empowered to address their first and most prominent problem: finding a home.

B. Constitutional Background

The Fourteenth Amendment to the United States Constitution, stated generally, ensures the citizenship and equality of all persons. It declares that the states may not deprive "any person of life, liberty, or property, without due process of the law" or deprive "any person within its jurisdiction the equal protection of the laws."[57] The Equal Protection and Due Process Clauses are part of the Fourteenth Amendment to the United States Constitution, but they tend to operate separately from each other.

The Equal Protection Clause applies to the state and federal government with equal force. Although there is no equal protection clause in the Fifth Amendment, the Fourteenth Amendment's Equal Protection clause has been interpreted to apply to the Federal Government.[58] The Court has, over time, cast a skeptical eye on statutes drawing classifications between groups of people.[59]

Statutes drawing distinctions based on "suspect classifications" are subjected to a higher level of judicial review.[60] The Supreme Court applies heightened scrutiny to laws found to discriminate against classes of people based on race, alienage, and national origin.[61] The Court also applies heightened scrutiny to laws found to discriminate against people based on sex and illegitimacy.[62] These are considered "quasi-suspect" classes.[63] Some state courts have found that classifying people according to sexual orientation also demands heightened scrutiny.[64] To

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57 U.S. CONST. amend. XIV, § 1.

58 *See* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

59 *See* United States v. Virginia, 518 U.S. 515, 533–34 (1996); Plyler v. Doe, 457 U.S. 202, 216 (1982); United States v. Carolene Prods. Co., 304. U.S. 144, 153 (1938).

60 *Carolene Prods.*, 304 U.S. at 153 n.4.

61 *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

62 *See* United States v. Virginia, 518 U.S. 515 (1996); Lalli v. Lalli, 439 U.S. 259 (1978); Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion); Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 DUKE J. GENDER, L. & POL'Y 385, 387 (2010) ("[T]he U.S. Supreme Court has applied heightened scrutiny to laws that discriminate based on several 'suspect' classifications: race, alienage, and national origin. It has also applied such scrutiny to 'quasi-suspect' classes including sex and illegitimacy.").

63 Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 426, 430 (Conn. 2008). *See generally* Rachel F. Moran, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 YALE L.J. 912 (1981) (reviewing the Supreme Court's equal protection jurisprudence and the development of suspect and quasi-suspect classes).

64 *Kerrigan*, 957 A.2d at 481 (holding a statutory ban on same-sex marriage unconstitutional on equal protection grounds).

argue statutes that draw distinctions based on suspect classes are constitutional, the government must show that the statute is "precisely tailored" to serve a compelling state interest.[65] To show that statutes drawing distinctions based on quasi-suspect classes are constitutional, the government must show an "exceedingly persuasive justification" substantially related to a state interest.[66] If the government cannot meet its burden, the law is deemed unconstitutional.

The Due Process Clause of the Fourteenth Amendment mirrors the language from the Fifth Amendment, effectively applying "due process" requirements to the states.[67] Due process includes two elements: procedural and substantive due process.[68] Underlying these elements are other subsets of rights considered protected by due process.[69]

Substantive due process requires that governmental actors do not deprive individuals of life, liberty, or property "even if those individuals receive an adjudication in which 'even the fairest possible procedure[s]' are observed."[70] "General law" due process protections are encompassed in the substantive Due Process Clause.[71] This "conception interpreted due process to require general and impartial laws rather than 'special' or 'class' legislation that imposed particular burdens upon, or accorded special benefits to, particular persons or particular segments of society."[72] The general law due process accords similar protections to those conveyed through the Equal Protection Clause; however, the most commonly referenced and recognized form of substantive due process is "fundamental rights" due process.[73] Under this doctrine, the Court determined that certain rights are so "fundamental" that if the legislature passes a law infringing on those rights, the law will be reviewed under a heightened scrutiny.[74] If the Court finds that the infringement on the fundamental right is "narrowly tailored to serve a compelling state interest[,]" then the law is constitutional.[75] If that showing is not made, then the law is unconstitutional.[76]

Procedural due process requires governmental actors and the judiciary to abide by a certain form of conduct during trial and ensure rules of fairness are

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65 Plyler v. Doe, 457 U.S. 202, 217 (1982).

66 *See Virginia*, 518 U.S. at 532–34.

67 *See* U.S. CONST. amends. V, XIV, § 1.

68 *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 408 (2010).

69 *See id.* at 419–20.

70 *Id.* at 419 & n.37 (alteration in original) (quoting Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting)).

71 *Id.* at 423–24.

72 *Id.* at 425.

73 *See id.* at 427.

74 Williams, *supra* note 68, at 427.

75 *Id.*

76 *See id.*

observed during that process.[77] Two of the better recognized procedural trial requirements are notice and the opportunity for a hearing.[78] The Supreme Court also recognized that the law requires "*actor*, *reus*, *judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings . . ." for there to be adequate procedure.[79] Accordingly, the most well-recognized application of procedural due process principles is courts' obligation to ensure fair procedures, meaning "compliance with duly enacted law and the formality of an adjudication[, in addition to requiring] . . . that the judicial procedures applied in connection with such an adjudication satisfy some normative conception of farness . . . ."[80] To determine if compliance with these fundamental procedural and fairness principles has been met, the Court applies the three-factor balancing test promulgated in *Mathews v. Eldridge*.[81]

C. The Criminalization of Homelessness: Statutory Challenges to be Made on Equal Protection and Due Process Grounds

When lawyers file lawsuits against governing bodies—local, state, and federal—they base constitutional challenges brought under these clauses on statutes promulgated by the governing body in question. These statutes tend to be a response to community residents who feel that homeless people are unsightly or dangerous.[82] By utilizing criminal justice measures, the legislature can effectively curtail the visibility of people experiencing homelessness.[83]

There are numerous types of statutes aimed at remedying the unsightly presence of homeless people in neighborhoods. These include: "mak[ing] it illegal to sleep, sit, or store personal belongings in public spaces";[84] making it illegal to camp or use some type of shelter, makeshift or otherwise, on public or private property;[85] banning sleeping in cars;[86] punishing people for begging or panhandling;[87]

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77 *See id.* at 418 ("According to Justice Roberts, '[p]rocedural due process has to do with the manner of trial [and] dictates that in conduct of judicial inquiry certain fundamental rules of fairness be observed.'" (quoting Snyder v. Massachusetts, 291 U.S. 97, 137 (Roberts, J., dissenting))).

78 *See* Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 2 (2006).

79 Williams, *supra* note 68, at 466 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280 (1855)).

80 *Id.* at 421–22.

81 424 U.S. 319, 334–35 (1976); Williams, *supra* note 68, at 422 & n.45 ("[C]ourts balance: (1) 'the private interest that will be affected by the official action'; (2) 'the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards'; and (3) 'the Government's interest, including function involved and the fiscal and administrative burdens that the additional or substituted procedural requirement would entail.'" (quoting *Mathews*, 424 U.S. at 335)).

82 U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 4, at 5–6.

83 *Id.*

84 *Id.* at 6.

85 NAT'L L. CTR ON HOMELESSNESS & POVERTY, *supra* note 48, at 23.

86 *Id.* at 25; U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 4, at 6.

87 NAT'L L. CTR ON HOMELESSNESS & POVERTY, *supra* note 48, at 25.

"ban[ning] or limit[ing] food distribution in public places . . . .";[88] making it illegal to use the bathroom or wash oneself outside (regardless of bathroom availability in the area);[89] and "selective[ly] enforcing neutral laws such as jaywalking, loitering, trespassing, and open container laws against people who are homeless."[90] These are the statutes that should be challenged under the Fourteenth and Fifth Amendments' Due Process and Equal Protection Clauses.

To make the challenges, a lawyer may argue on his client's behalf that the legislation is unconstitutional "on its face" or "as applied" to the client.[91] This challenge makes it possible for the judiciary to invalidate the legislation.[92] If a court determines that a statute is unconstitutional on its face, then "it must be invalidated as to all possible applications and is thus rendered null and void."[93] If a court instead invalidates the statute as applied to the plaintiff(s) bringing suit, the statute is invalid "only as applied to the plaintiff's particular circumstances, in which case the statute remains valid for other applications that do not raise similar constitutional concerns."[94] While invalidating a statute on its face may be a more expansive remedy, a lawyer's argument that a statute is unconstitutional as applied can also invalidate statutes enforced against the homeless. If a statute is struck for being unconstitutionally enforced against the homeless population, then it cannot be utilized as an enforcement tactic against that same population in the same way moving forward.[95]

II. ANALYSIS

There are a number of different methods to obtain a higher level of scrutiny than rational basis review. The three higher degrees of scrutiny are (in order from highest to lowest): (1) strict scrutiny; (2) intermediate scrutiny; and (3) rational basis with a bite scrutiny.[96] Each level of scrutiny can be argued for in different ways.

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88 *Id.*

89 U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 4, at 6.

90 *Id. See generally* NAT'L L. CTR ON HOMELESSNESS & POVERTY, *supra* note 48, at 22–26.

91 *See, e.g.*, Allen v. City of Sacramento, 183 Cal. Rptr. 3d 654, 659–60 (Cal. Ct. App. 2015) (challenging an anti-camping ordinance on the basis that it is unconstitutional as written and because the city enforces the ordinance in a discriminatory way). *See generally* Stefanie A. Lindquist & Pamela C. Corley, *The Multiple-Stage Process of Judicial Review: Facial and As-Applied Constitutional Challenges to Legislation Before the U.S. Supreme Court*, 40 J. LEGAL STUD. 467 (2011).

92 Lindquist & Corley, *supra* note 91, at 469.

93 *Id.*

94 *Id.*

95 *See id.*

96 Traditionally, "rational basis with a bite" scrutiny has not been formally recognized by the court. However, scholars and practitioners in the legal profession generally accept it as a higher form of scrutiny. For a brief overview of rational basis, intermediate scrutiny, and strict scrutiny standards, see R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225 (2002). For a brief overview of rational basis with a bite review, see Raphael Holoszyc-Pimentel, Note,

A. Strict Scrutiny

The best way to argue for strict scrutiny under the Fourteenth Amendment is by asserting that the statutes at issue infringe on the homeless plaintiff's equal protection and due process rights. The Court's evolving doctrine reveals that the Court has given credence to arguments that refer to statutory right violations having to do with wealth inequities, so long as the Due Process *and* Equal Protection Clauses are violated.[97] Indeed, by focusing on the intersection between procedural due process and equal protection, the Court has the opportunity to "get[] at the heart of an urgent, practical problem: indigent people often suffer from both (1) arbitrary decision-making and inadequate access to courts, as well as, (2) the unequal outcomes that result."[98] Sometimes, claims brought under both clauses are dubbed "equal process" claims.[99] These claims are increasingly featured in court opinions.[100] Accordingly, scholars believe bringing claims consistent with this reasoning may yield promising results for plaintiffs'.[101]

Although this analysis has yet to be recognized by the Supreme Court as a way to trigger strict scrutiny, scholars Brandon L. Garrett and Kerry Abrams theorize that by relying on the intersection of these two rights, "separate concerns with procedural arbitrariness can heighten the concern about discrimination."[102] By combining the issues into a single procedural *and* substantive claim under the Fourteenth Amendment, a lawyer can argue that "[g]roups left out of the political process may face arbitrary treatment, which is of distinct concern and adds weight to their claims, even if they are not recognized as a suspect class . . . ."[103] This was essentially the route taken by the Eleventh Circuit in *Jones v. Governor of Florida*.[104] There, the court applied heightened scrutiny where felons were

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Reconciling Rational-Basis Review: When Does Rational Basis Bite?, 90 N.Y.U. L. REV. 2070 (2015), and Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

97 *See* Bearden v. Georgia, 461 U.S. 660, 665–67, 674 (1983) (holding that there was a constitutional violation where unfair process and wealth inequality were at issue); Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397, 402 (2019) ("Yet wealth disparities do still receive careful equal protection scrutiny, just not based on equal protection alone."); Kenji Yoshino, *The New Equal Protection*, HARV. L. REV. 747, 749–50 (2011) [hereinafter Yoshino, *New Equal Protection*] ("The Court has long used the Due Process Clauses to further equality concerns, such as those relating to *indigent individuals*, national origin minorities, racial minorities, religious minorities, sexual minorities, and women." (emphasis added)).

98 Garrett, *supra* note 97, at 405.

99 *Id.* at 402 ("'[E]qual process' claims arise from the line of Supreme Court and lower court cases in which wealth inequality is a central concern."). For purposes of this article, I will refer to these types of claims as equal process claims.

100 *Id.* at 402–03.

101 *Id.* at 405–06.

102 *Id.* at 447.

103 *Id.*

104 950 F.3d 795 (11th Cir. 2020).

foreclosed from exercising their right to vote if they had outstanding court fees.[105] The court explained:

> heightened scrutiny applies in this case because we are faced with a narrow exception to traditional rational basis review: the creation of wealth classification that punishes those genuinely unable to pay fees, fines and restitution more harshly than those able to pay—that is, it punishes more harshly solely on account of wealth . . . .[106]

This argument, therefore, could persuade courts that statutes criminalizing homelessness should be reviewed under strict scrutiny.[107]

The leading case joining the Equal Protection and Due Process Clauses to hold a statute unconstitutional is *Bearden v. Georgia*.[108] *Bearden* involved an indigent individual who was imprisoned as a result of his inability to pay fines and fees required by his probation.[109] The Supreme Court analyzed the issue by reviewing Due Process and Equal Protection jurisprudence, concluding that utilizing principles from both clauses separately was not a novel methodology to deciding cases.[110] The Court implied that to determine the statute's constitutionality, the Court must address both the due process and equal protection questions presented, in a single analysis:[111]

> Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, and the existence of alternative means for effectuating the purpose . . . ."[112]

Subsequently, the Supreme Court utilized this doctrine to invalidate statutes that infringed on the plaintiff's converging equality and due process rights.

Homeless plaintiffs have a good argument that statutes effectively criminalizing homelessness are unconstitutional using an equal process analysis. Statutes, such as those targeting "camping" or "panhandling," classify such

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105 *Id.* at 804, 808–09.

106 *Id.* at 809.

107 *See* Garrett, *supra* note 97, at 446–47. *See generally* Fred Lautz, Note, *Equal Protection and Revocation of an Indigent's Probation for Failure to Meet Monetary Conditions:* Bearden v. Georgia, 1985 WIS. L. REV. 121 (reviewing Bearden v. Georgia and its progeny, concluding that the line of cases suggests courts should apply strict scrutiny to cases where defendants are treated differently in the criminal justice system due to their wealth).

108 461 U.S. 660, 660 (1983) (holding the statute was unconstitutional as applied).

109 *Id.* at 661.

110 *Id.* at 664–67.

111 *Id.* at 665–66; *see also* Garrett, *supra*, note 97, at 419 ("The Court did not suggest that it was departing from *Rodriguez* and applying heightened scrutiny to class-based discrimination. Instead, the result followed from the combination of class-based harm and unfair and arbitrary procedures. It was an intersectional and cumulative analysis.").

112 *Bearden*, 461 U.S. at 666–67 (quoting Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring)).

activities as misdemeanors.[113] Misdemeanor charges result either in minor fines or in jail time; sometimes both. The main difference between misdemeanors and felonies is that the former class of crime is minor and as such punishment is limited—usually by up to 364 days in jail and a certain monetary payment.[114] Because homeless individuals have scarce, if any, access to money, the court may be influenced to impose jail time for any charge accrued. Alternatively, if the court imposes a fine, the homeless plaintiff is usually not in a position to pay it. If they don't pay it, the individual will be in a position where they could be charged with another crime, or imprisoned.[115] While challenging a specific statute will require a more specific analysis showing wealth discrimination against the homeless, this type of statutory enforcement scheme is clearly identifiable discrimination based on economic status.

There are alternatives to this type of criminalization. There are innumerable government-funded and NGO conducted studies showing alternatives to criminalization are viable and result in decreased numbers of homeless.[116] For example, in Syracuse, New York, Mayor Stephanie Miner's rejection of criminalization policies and her emphasis on a Housing First model resulted in the city becoming one of the nation's first to end veteran homelessness.[117] Thus, while proponents of criminalization statutes purport the statutes to be a remedy for homelessness, the total deprivation of liberty and the perpetuation of homelessness that results from the arrest of these individuals cannot be logically shown to further legislative means and purpose.

B. Intermediate Scrutiny

Intermediate scrutiny is fundamentally a subset of heightened scrutiny. In other words, arguing for strict and intermediate scrutiny is essentially the same.[118]

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113 *See* SACRAMENTO, CAL., CODE § 12.52.030 (effective Jan. 14, 2021) (prohibiting camping or using "camp paraphernalia" on any public or private property); MIAMI, FLA., CODE § 37-8 (2020) (prohibiting panhandling in downtown business district of the city); *see also* Mark Roseman, *Misdemeanors: Trapdoor Justice for the Poor and Homeless*, MEDIUM (Feb. 07, 2019), https://medium.com/@markeroseman/misdemeanors-trapdoor-justice-for-the-poor-and-homeless-7ddf47ba72fc (discussing the criminalization of unavoidable behaviors).

114 *Misdemeanor Sentencing Trends*, NAT'L CONF. ST. LEGISLATURES (Jan. 29, 2019) , https://www.ncsl.org/research/civil-and-criminal-justice/misdemeanor-sentencing-trends.aspx ("The most common misdemeanor-felony penalty threshold is one year."); Roseman, *supra* note 113 (citing aggravated misdemeanors in California with a maximum punishment of up to 364 days in jail and a fine in excess of $1,000).

115 *See* Joseph Shapiro, *Jail Time for Unpaid Court Fines and Fees Can Create Cycle of Poverty*, NPR (Feb. 9, 2015), https://www.npr.org/sections/codeswitch/2015/02/09/384968360/jail-time-for-unpaid-court-fines-and-fees-can-create-cycle-of-poverty; *see also* Joseph Shapiro, *As Court Fees Rise, the Poor are Paying the Price,* NPR (May 19, 2014), https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor (discussing the poverty cycle of court fees for low-income individuals).

116 *See, e.g.,* U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 4, at 36–38 (proposing empirical solutions as alternatives to criminalization of homelessness in communities).

117 NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 48, at 40.

118 *See* Pollvogt, *supra* note 15, at 743 ("Levels of scrutiny . . . come in essentially two varieties: rational basis review and heightened scrutiny.").

A court determines based on these arguments which "heightened" scrutiny to impose. The traditional equal protection analysis is likely a better-suited argument for intermediate scrutiny than strict scrutiny due to precedent showing the Court's recent apprehension to recognize suspect classes solely under the Equal Protection clause.[119] Although it is unclear how the Court separates classes deemed quasi-suspect or suspect, if a class possesses at least some of the characteristics necessary to be suspect, "it should qualify at least for protection as a quasi-suspect class."[120]

Homeless people should be deemed a "quasi-suspect" class in accord with equal protection and statutes discriminating against them should trigger intermediate scrutiny. It has already been determined that aside from narrow exceptions, wealth discrimination requires only rational basis review.[121] In *San Antonio Independent School District v. Rodriguez*, the Court stated that wealth discrimination alone was not enough to merit strict scrutiny.[122] There, the plaintiffs challenged Texas's statutory taxation scheme that enabled children with wealthier families to pay more taxes to their school and consequently the wealthier district paid much more in per-pupil expenses.[123] The Court found that strict scrutiny was unavailable to the plaintiffs because they were unable to show that the statutory scheme discriminated against a *specific* class of poor individuals while also demonstrating an absolute deprivation of education.[124] However, there are differences in the discriminatory effects of the statute at issue in *Rodriguez* and statutes that could be challenged for criminalizing homeless people. Moreover, the Court acknowledged that the classification issue presented in *Rodriguez* was "*sui generis*,"[125] so the Court would not likely find the same problems in a challenge brought for homeless plaintiffs. Accordingly, *no* court has yet determined if the homeless are a suspect or quasi-suspect class.[126] Although, improbable, arguing for heightened scrutiny under the traditional Equal Protection Clause analysis may yet avail.

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119 *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 445–46 (1985) (holding mentally retarded people are not a suspect class); Yoshino, *New Equal Protection*, *supra* note 84, at 748 ("Over the past decades, the Court has systematically denied constitutional protection to new groups, curtailed it for already covered groups, and limited Congress's capacity to protect groups through civil rights legislation." (footnotes omitted)).

120 Moran, *supra* note 63, at 918–19.

121 *See* Harris v. McRae, 448 U.S. 297, 323 (1980) ("[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification." (citing James v. Valterra, 402 U.S. 137 (1971))).

122 411 U.S. 1, 29 (1973).

123 *Id.* at 4–16.

124 *Id.* at 25–26.

125 *Id.* at 18.

126 *See, e.g.,* Roulette v. City of Seattle, 850 F. Supp. 1442, 1449 (W.D. Wash. 1994) ("[Plaintiffs acknowledge] that there is no precedent recognizing the homeless as a suspect class . . . ."). However, some courts have acknowledged that the homeless may be a suspect class. *See* Pottinger v. Miami, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992) ("This court is not entirely convinced that homelessness as a class has none of these 'traditional indicia of suspectness.' It can be argued that the homeless are saddled with such disabilities, or have been subjected to a history of unequal treatment or are so politically powerless that extraordinary protection of the homeless as a class is warranted.").

To argue for intermediate scrutiny, it is necessary to show that a certain class is "quasi-suspect." Courts recognize a class as suspect if the group has the "indicia of suspectness."[127] This indicia presents in a set of factors, including that the group: (1) is a discrete and insular minority, (2) is politically powerless, (3) has historically been discriminated against, (4) has a trait unrelated to the group's capacity to contribute to society, and (5) has an immutable trait.[128] A court determines whether the class is suspect based on how many of these factors are met.[129] The "qualification for quasi-suspectness turns on whether a class shares at least *some* . . . indicia of suspectness."[130] It may also be important to the court that the class in question overlaps with other recognized suspect classes.[131]

The "discrete and insular minority" has been interpreted by the Supreme Court in two ways: broadly and narrowly.[132] The homeless, as a class, fit both definitions. The broad definition, promulgated in *Carolene Products*, describes a discrete and insular minority as "'any socially isolated minority group,' or any group that is 'not embraced within the bond of community kinship, but . . . held at arm's length by the group or groups that possess dominant political and economic power.'"[133] The narrow, linguistic definition requires that the class is literally isolated from the mainstream. The homeless are both self-isolated and isolated by the general public.[134] Localities and state governments commonly adopt enforcement tactics and legislation that criminalize homeless individuals, thereby accommodating community members who complain about the homeless individual's presence.[135] Moreover, governments may build shelters in an attempt to "sweep homeless people from public view."[136] As a result of these tactics, homeless people effectively go into hiding "by living in more dispersed groups or even alone."[137] If a class is shown to be a discrete and insular minority, the Court has acknowledged that it is required to engage in a more searching inquiry to ensure its equality is

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127 Moran, *supra* note 63, at 916.

128 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–47 (1985); Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973).

129 Pollvogt, *supra* note 15, at 742.

130 Moran, *supra* note 63, at 916 (emphasis added).

131 *Id.* at 920 (discussing additional, non-determinative factor of overlap).

132 Jennifer E. Watson, Note, *When No Place is Home: Why the Homeless Deserve Suspect Classification,* 88 IOWA L. REV. 501, 516–18 (2003).

133 *Id.* at 516–17 (alternations in original) (quoting Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1105 n.72 (1982)).

134 SCHNABLY, *supra* note 19, at 556–60 (explaining how local governments have engaged in a strategy to make the homeless "invisible," and how the homeless have accommodated that strategy by employing the same to avoid harassment).

135 *See supra* Part I.C. (explaining criminalization motives and methods for locales and governments).

136 SCHNABLY, *supra* note 19, at 559.

137 *Id.* at 560.

upheld.[138] This factor is arguably the most persuasive and important to the courts.[139]

The unhoused population are also a politically powerless group. They struggle to exercise the right to vote due to residency and domicile requirements, and identification requirements, among others.[140] As the Supreme Court explained, "the political franchise of voting is . . . regarded as a fundamental political right, because [it is] preservative of all rights."[141] As such, without a residence, the unhoused population inevitably do not meet residency requirements and cannot influence the political process.[142] There has been some organization around homeless rights in recent years, but it is important to note that "much of the political organizing . . . has relied heavily on appeals to the charity of the better-off."[143] Making headway in politics is no easy task and requires powerful allies and advocates. These allies are hard to find absent personal assets or clout—of which the homeless have neither.

Beginning in the fourteenth century and continuing today, the homeless have been subject to discrimination.[144] In the 1600's, the homeless, otherwise known as "vagrants," and later "tramps," were social outcasts, considered no better than criminals.[145] Indeed, "[t]he homeless have overwhelmingly been 'subjected to a history of purposeful and unequal treatment.'"[146] This discriminatory treatment and terminology used to describe the homeless has continued today. Current criminalization statutory schemes reveal legislatures' disdain for the homeless, and the lack of community reprimand for such legislation reveals implicit agreement—at the very least—by the general public.[147] Beyond legislation, many homeless individuals report they have suffered discrimination by private businesses and law

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138 United States v. Carolene Prods., 304 U.S. 144, 152–53 n.4; *see* Watson, *supra* note 132, at 516.

139 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1012 (1978) (arguing that discreteness and insularity should be the central criteria of suspectness and quasi-suspectness).

140 Watson, *supra* note 132, at 522; *see* Kriston Capps, *Voting While Homeless*, BLOOMBERG: CITYLAB (Nov. 8, 2016, 4:00 PM), https://www.bloomberg.com/news/articles/2016-11-08/the-struggle-to-vote-while-homeless.

141 Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); *see also* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966) (holding poll tax violates Equal Protection Clause of the Fourteenth Amendment); Reynolds v. Sims, 377 U.S 533, 562 (1964) (holding states must create legislative districts with substantially equal number of voters to comply with Equal Protection Clause of Fourteenth Amendment).

142 Watson, *supra* note 132, at 522. *But see* SCHNABLY, *supra* note 19, at 569 ("[H]omeless people have formed unions . . . [t]hey have marched to city halls, invaded city council meetings, occupied local housing offices, and initiated drives to register to vote, all in an effort to give themselves their own voice in politics.").

143 SCHNABLY, *supra* note 19, at 570.

144 Watson, *supra* note 132, at 523.

145 KENNETH L. KUSMER, DOWN AND OUT, ON THE ROAD: THE HOMELESS IN AMERICAN HISTORY 13, 29 (2001) ("As early as 1640 'vagrant persons' were listed among the social outcasts that peace officers in Boston were charged with apprehending.").

146 Watson, *supra* note 132, at 523 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

147 *See supra* Part I.C.

enforcement.[148] Poor public perception and discrimination is reflected ubiquitously in both historic and present treatment of the homeless in the United States.

The fact of an individual's homelessness does not bear on his ability to contribute to society. A characteristic that "bears no relation to [the] ability to perform or contribute to society" serves as a suspect basis to classify a group.[149] The homeless have no outstanding character traits, disabilities, or criminal proclivities deterring their ability to contribute to society.[150] Instead, they are a group suffering due to the shortfalls in America's system of government, that leaves its most impoverished without stable housing.[151] "A peaceful beggar poses no threat to society."[152] Homelessness, therefore, is not a classification that relates in any way to an individual's ability to contribute to society and, if used as a statutory classification, would "have the effect of invidiously relegating the entire class . . . to inferior legal status."[153]

The final factor, immutability, is defined by courts more broadly than the text suggests.[154] Immutability is sometimes defined as a "non-volitional characteristic."[155] Logic, precedent, and case studies contend that homelessness is necessarily involuntary.[156] However, even if the Court determines homelessness

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148 Scott Keyes, *Virtually All Homeless People Experience Discrimination*, THINKPROGRESS (Apr. 21, 2014, 5:16 PM), https://archive.thinkprogress.org/virtually-all-homeless-people-experience-discrimination-126b5eb4d610/ ("More than 70 percent reported they had experienced discrimination from private businesses. Two in three said they'd been unfairly targeted by law enforcement. . . .").

149 Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

150 *See generally* Pottinger v. Miami, 810 F. Supp. 1551, 1582–83 (S.D. Fla. 1992) (discussing how the homeless are no more criminal, or disabled than any other portion of society, aside from their poverty).

151 *See supra* Part II.A (discussing the causes of homelessness, namely that the government cut federal funding over the last twenty years instead of supplementing it, or adjusting it for inflation); *see also* U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 4, at 6 ("The current economic recession and foreclosure crisis exacerbate the problem of homelessness, threatening to push these numbers even higher, as they have resulted in federal, state, and local budgetary limitations that undercut the ability of communities to provide adequate housing and services needed to prevent and end homelessness.").

152 *Pottinger*, 810 F. Supp. at 1583.

153 *Frontiero*, 411 U.S. at 686–87.

154 *See* Holoszyc-Pimentel, *supra* note 96, at 2085 (citing Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring) ("It is clear that by 'immutability' the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. People can frequently hide their national origin by changing their customs, their names, or their associations. Lighter skinned blacks can sometimes 'pass' for white, as can Latinos for Anglos, and some people can even change their racial appearance with pigment injections. At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.").

155 Watson, *supra* note 132, at 527.

156 *See* Jessica Lipscomb, *Advocate's Videos Tell the Story of Miami Beach's Homeless*, MIAMI NEW TIMES (Nov. 17, 2016, 9:00 AM), https://www.miaminewtimes.com/news/advocates-videos-tell-the-story-of-miami-beachs-homeless-8928779 ("Through the process of filming her videos, Navarette found only one person who said he was cool with being homeless. Everyone else unequivocally agreed they'd rather be in a shelter, hotel, or apartment."). *See generally* NAT'L L. CTR ON HOMELESSNESS & POVERTY, *supra* note 48 (discussing the many reasons causing individuals and families to be homeless–all involuntary). For an analysis showing why the court should hold homelessness is an immutable characteristic, see Watson, *supra* note 132, at 526–33.

does not fit the Court's definition, immutability is considered neither a necessary nor sufficient factor to show a class should receive heightened scrutiny.[157]

The overwhelming analysis showing homelessness meets most factors for suspectness should be persuasive to the judiciary that the homeless are at least a quasi-suspect class. Notably, huge disparities in racial minorities represented in the homeless population as compared to the general population may lend more support to the argument that the class should be afforded more protection by the Court.[158] These disparities, in conjunction with the extra weight accorded those classes deemed "discrete and insular," is more evidence that the homeless should receive heightened scrutiny.

C. Rational Basis "with a Bite" Scrutiny

Rational basis "with a bite" review has never been explicitly mentioned by the United States Supreme Court.[159] However, considering the extremely deferential nature of rational basis review, when the Court has invalidated statutes under this standard, it "appears to be employing a higher standard."[160] Scholars dubbed this standard "rational basis with a bite."[161]

There are two predominant interpretations of how and when rational basis "bites." The first employs the same traditional equal protection analysis used to determine if a class is suspect or quasi-suspect.[162] It arguably utilizes more factors than the traditional analysis, including and especially: animus.[163] The second interpretation focuses solely on that factor.[164] Under this interpretation, the plaintiff's burden is only to show the presence of actual animus for the court to strike down the law.[165] The first interpretation relies on the same analysis done in the preceding section, and for that reason, this section will focus on the second interpretation.[166]

For legislation to be struck down in accord with a biting rational basis review, a lawyer will have to show that the legislation was promulgated with a

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157 *See* Moran, *supra* note 63, at 918 ("Immutability . . . cannot serve as a touchstone of suspectness, even though it is not entirely irrelevant."); Pollvogt, *supra* note 15, at 742 (explaining that of the numerous factors used to determine the suspectness of a class, only some portion of them must be shown for the court to grant suspect or quasi-suspect status).

158 *See supra* Part I.A.

159 Holoszyc-Pimentel, *supra* note 96, at 2072–73; *see also* Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, 37 N.Y.U. REV. L. & SOC. CHANGE 331, 333 (2013) [hereinafter Yoshino, *Rational-Basis Review*] ("Ordinary rational-basis review, then, operates as a free pass for legislation.").

160 Holoszyc-Pimentel, *supra* note 96, at 2071–72.

161 *Id.*

162 *Id.* at 2072.

163 Yoshino, *Rational-Basis Review*, *supra* note 159, at 335.

164 *See id.*

165 *See id.* (explaining that precedent and logic belie the argument that the plaintiff must rebut any and all other reasons for legislation to the exclusion of the sole desire to harm a group).

166 *See supra* Part II.B.

"bare . . . desire to harm" a specific group.[167] In the seminal case, *Moreno*, the Court reviewed the legislative history and found that the statute at issue passed in order to "prevent so-called 'hippies' and 'hippie communes' from participating in the" government program.[168] The Court explained that such a bare desire to harm a politically unpopular group could not constitute a legitimate governmental interest.[169] If the Court would have upheld such a provision on those grounds, it would essentially discredit the constitutional right to equality.[170] Subsequently, when the Court has detected animus it has imposed a rational basis with a bite standard of review.[171]

The Court has detected animus through either direct evidence or inferential evidence based on the structure of the law.[172] Direct evidence is often found through the legislative history of a piece of legislation, such as in *Moreno*.[173] Alternatively, the Court has examined the purported reasons for legislation, and if it ultimately finds them incredible, it has inferred animus.[174] This is the method the Court utilized in *Romer*, where it explained: "the breadth of the legislation," was so far removed from the justifications for the legislation at issue that they were impossible to credit.[175] Thus, in order to receive heightened scrutiny by way of rational basis with a bite review, a lawyer would need to show the legislature had animus for the homeless.

CONCLUSION

There are numerous ways to attain heightened scrutiny for America's homeless under the Fourteenth Amendment. This group exists as a symptom of disparities present in the system of government that does not provide aid to its most needy and impoverished. Legislatures have an obligation to remedy the struggles and vulnerabilities unique to the homeless population. Unfortunately, legislatures have for too long relied on the crutch of criminalization. If the judiciary imposes heightened scrutiny on statutes discriminating against the homeless, legislatures will be forced to focus on more productive measures to fix the problem. By utilizing any of the advocacy routes enumerated to attain heightened scrutiny, lawyers representing homeless plaintiffs have a strong chance of persuading the judiciary. Employing these arguments may result in a more equitable American society and jurisprudence.

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167 U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

168 *Id.*

169 *Id.*

170 *Id.*

171 *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 432 (1985); *see also* Romer v. Evans, 517 U.S. 620, 634 (1996).

172 Holoszyc-Pimentel, *supra* note 96, at 2093.

173 413 U.S. at 534; *see also* United States v. Windsor, 570 U.S. 744, 770–71 (2013) (using direct evidence of animus toward homosexuality to strike down a law as unconstitutional with a biting rational basis review).

174 *Romer*, 517 U.S. at 632.

175 *Id.*